

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1330

To be submitted

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1330

UNITED STATES OF AMERICA,

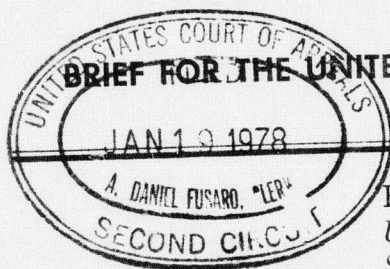
Appellee,

—v.—

ALFRED LEWIS

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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**United States Court of Appeals
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Docket No. 77-1330

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFRED LEWIS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Alfred Lewis appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 18, 1977, following a three-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 77 Cr. 71, filed February 2, 1977, charged the defendant Lewis in two counts with bank robbery and armed bank robbery in violation of Title 18, United States Code, Section 2113(a) and (d), respectively.

Trial commenced on April 18, 1977 and ended on April 20, 1977 when the jury returned a verdict of guilty on both counts. On May 18, 1977 the District Court imposed concurrent fifteen-year terms of imprisonment on each count.

Lewis is presently serving his sentence.

Statement of Facts

The Government's Case

The evidence overwhelmingly established that Alfred Lewis was the armed robber who stole more than \$60,000 from the Chemical Bank at 59th Street and Madison Avenue in Manhattan on January 27, 1977. Twenty minutes after the robbery, still wearing part of his disguise, Lewis was arrested with a cocked and loaded .45 caliber pistol and a suitcase containing the money which he had stolen from the bank.

A. The Robbery

Armed with a .45 caliber pistol, Alfred Lewis entered the bank at about 9:45 A.M. on January 27, 1977. He was disguised in an olive-colored ski jacket and wore a knit mask which covered his nose, as well as a knit cap which came down over his forehead and glasses. (GX 1A-1H).^{*} Lewis pointed the pistol at the tellers and directed them to fill two shopping bags with money. (Tr. 40-42). Susan Brewer, the Assistant Manager, saw Lewis bend over and she noticed that the skin at the back of his neck was "yellowish tinted" and that he had very short curly hair. (Tr. 42).^{**} Before leaving the bank he collected \$60,142 in cash, including about \$400 in pre-recorded decoy money.

B. The Chase and the Arrest of Alfred Lewis

Two tellers, Daniel Gonzales and James Rodriguez, pursued Lewis from the bank. They saw him enter a

^{*} "Tr." refers to the trial transcript. "GX" refers to Government exhibits.

^{**} Alfred Lewis is a light-skinned black man, balding with short curly hair on the sides and back.

double-parked car at 60th Street and Madison Avenue, and they followed on foot as he drove the car west on 60th Street. (Tr. 68-70). After turning left onto Fifth Avenue, Lewis turned right at Grand Army Plaza, and right again onto Central Park South, where he collided with a car driven by Reinaldo Carnaval. (Tr. 70, 88-89).

After his car was hit, Carnaval lost sight of Lewis' car, but a few minutes later he saw Lewis abandon the car at Central Park South and Seventh Avenue. (Tr. 90-92; GX 7). When Carnaval confronted Lewis and asked "What happened to my car?", Lewis replied by placing his hand in his coat pocket and saying, "Get out of here, boy, if you don't want to get killed." (Tr. 93).

Undeterred by Lewis' threat, Carnaval followed Lewis and saw him enter a cab driven by Samuel Goldstein. (Tr. 106). Carnaval approached the cab and told Goldstein not to take Lewis because he was a burglar who had left the scene of an accident. (Tr. 94, 106). When Lewis promptly left Goldstein's cab and began to walk away, Goldstein approached Lewis with a night stick. Lewis then revealed that his initial threat to Carnaval was not an idle gesture—Lewis pointed the .45 caliber pistol at Goldstein and threatened to kill him if he did not leave. (Tr. 106).

Goldstein immediately returned to his cab and reported the incident to his dispatcher on the radio. (Tr. 107). Meanwhile, Lewis entered a cab driven by James Godette at 61st Street and Central Park West. (Tr. 96, 108). Lewis told Godette to take him to 100th Street and Amsterdam Avenue, and Godette drove north on Central Park West, west on 72nd Street and north on Amsterdam Avenue. (Tr. 114-115) Goldstein and Carnaval followed in Goldstein's taxicab, while Goldstein broadcast the chase to his dispatcher. (Tr. 108).

At 73rd Street and Amsterdam Avenue, Godette's cab stopped for a red light, with Goldstein's cab immedi-

ately behind it. (Tr. 109). There, Goldstein and Carnaval hailed an unmarked police car driven by Police Officer Walter Cowles. (Tr. 118). Carnaval told Officer Cowles that the cab in front of them contained a man with a gun and that the man had just hit Carnaval's car. (Tr. 97, 109, 119). Officer Cowles then joined the pursuit until Godette's cab carrying Lewis was stopped by a police roadblock at 85th Street and Amsterdam Avenue. (Tr. 120).

Once the taxi stopped, Officer Cowles, dressed in civilian clothes, approached the taxi from the rear with his gun drawn. He opened the passenger door, identified himself, and told Lewis to get out of the cab. Lewis had one hand in his coat pocket and the other on his leg. Cowles told Lewis to take his hand out of his pocket and when Lewis did not respond, he repeated the instruction. After Lewis finally withdrew his hand and got out of the cab, Officer Cowles told him to lean against the cab and asked if he had a gun. Lewis said nothing but nodded affirmatively. Officer Cowles then reached into the raincoat pocket from which Lewis had removed his hand and found a .45 caliber pistol which was loaded and cocked, with a round in the firing chamber. (Tr. 120-22).

Other police officers removed from the rear seat of the cab the blue suitcase which Lewis used to hide the money he had stolen from the bank. (GX 7). Lewis was frisked, and the officers removed a piece of black knit material from around his neck which he had used as a disguise during the robbery, as well as a holster (GX 16) from his belt and a clip of .45 caliber ammunition from a pocket (GX 13), (Tr. 158). The blue suitcase was opened at the 20th Precinct. It contained most of the \$60,000 stolen from the bank, including the decoy money (GX 6A-D), several bank envelopes (GX 3A-D), and cash substitution tickets from the tellers' cash drawers (Tr. 4A-C) and two shopping bags (GX 5A-B), (Tr. 127).

C. Post-Arrest Investigation

The automobile which Lewis had abandoned on Central Park South was searched by New York police officers. On the ground outside the passenger door of the car, Sergeant Kosack found a green knit ski hat which Susan Brewer had identified as the robber's. (GX 14; Tr. 49, 182-83). On the passenger side of the car, from which Lewis had exited earlier, Sergeant Kosack found loose bills lying on the floor and a wrapped packet of \$5,000 in cash from the Chemical Bank. At the 20th Precinct Sergeant Kosack added this money to the money found with Lewis in the blue suitcase (Tr. 182-84).

Lewis was taken to the precinct by Officers Baumer and Calabrese, who immediately placed him in a detention cell. (Tr. 143, 160). Although the officers did not recall Lewis' exact dress, Officer Baumer remembered that Lewis was dressed in bulky fashion, and that the cell was empty at the time he was placed in it. (Tr. 144). Each item of Lewis' clothing was then searched, and he was left in the cell alone with the clothing he had on, including the olive-drab ski jacket (GX 17), which Susan Brewer had identified as "just the kind of jacket" worn by the robber. (Tr. 49, 205). Mrs. Brewer also identified the pants and shoes Lewis was wearing at the police station as the same pants and shoes worn by the bank robber. (Tr. 63).

The Defendant's Case

Lewis testified and related an incredible defense that the bank was robbed by a man named "Max", who had given the money and the getaway car to the defendant during the few minutes on Central Park South when the car was not in the view of any of its pursuers. (Tr. 249-97). Lewis admitted having been arrested with the loaded pistol and the suitcase filled with money from the

bank robbery. Lewis claimed that he had been framed by police officers, who had placed the black knit ski mask and green jacket among his clothing at the precinct. (Tr. 273-75).

According to Lewis, Max* approached him one day in a Times Square bookstore and asked if Lewis had recently been released from prison. When Lewis replied that he had, Max offered Lewis a job carrying money as a courier for Max's midtown gambling operation. Lewis claimed that Max advanced him \$100 and promised a \$2,000 fee for transferring money at a later date. (Tr. 253). According to Lewis after he had made several reconnaissance trips to the area of 62nd Street and Fifth Avenue, Max called to arrange a meeting for 8:30 A.M. on Thursday, January 27th. (Tr. 254-55). Max met Lewis in Harlem in a dark brown Ford and had Lewis drive to Central Park South near Sixth Avenue. During the ride Max loaded the .45 pistol which he had previously given Lewis. The defendant testified that Max let him out of the car on the south side of Central Park South, told him to cross the street and wait. (Tr. 257). He told Lewis that when he returned, Lewis was to take the car and a suitcase filled with money and meet Max's agent at 181st Street and Broadway. About fifteen minutes later, Max drove up in the car, jumped out, and told Lewis to drive away. (Tr. 259). Lewis claimed that Max was wearing the green jacket (GX 17) and hat (GX 15) but not the black knit ski mask. (GX 14; Tr. 258, 269, 275). Lewis testified that he drove the car west on Central Park South, but had to abandon

* Lewis at first described Max on direct examination as a white fellow with blond hair (Tr. 252). On cross-examination he testified that Max had brown hair and that he remembered the color. (Tr. 293). During one slip during his narrative direct examination, Lewis even called the man "George." (Tr. 252).

it just west of Seventh Avenue because it had a flat tire. (Tr. 259). He left the car by the passenger side, taking with him the blue suitcase which Max had left in the car. (Tr. 260).

Lewis admitted threatening Carnaval and claimed that he was afraid that Carnaval, who was unarmed while Lewis had a .45 caliber pistol, intended to rob him. (Tr. 260-61). He also admitted pointing the loaded gun at the first cab driver, Goldstein, after Carnaval approached the taxi and told Goldstein not to drive off with Lewis. (Tr. 262). In an effort to escape, Lewis descended to the subway at 61st Street and Central Park West, but found that it was an exit only. Returning to the street, he entered Godette's cab, but was unaware that they were being followed by Goldstein and Carnaval. (Tr. 262-63).

Lewis recalled the police roadblock at 85th Street and Amsterdam Avenue, and his arrest by Officer Cowles. (Tr. 264). However, he claimed that Cowles removed the gun from a holster, not the raincoat pocket (Tr. 264, 286), and he denied wearing the green coat (GX 16) and the black knit ski mask (GX 14) under his other clothing. (Tr. 264, 268, 275). Rather, Lewis testified that after he was searched at the 20th precinct, police officers brought the green coat into the detention cell and told him to put it on. Claiming that he recognized it as the coat worn by Max, Lewis testified that he was reluctant to put it on, but complied when ordered to do so. (Tr. 264-65). Then, he claimed, Susan Brewer viewed him and said, "Yeah, that looks like him." (Tr. 265).

In an effort to further his claim that he had not worn the black knit mask and ski hat, Lewis presented the testimony of FBI Special Agent John Hippard, an expert in microscopic analysis of evidence. The witness was presented as a Court's witness at Lewis' request, and

against the advice of his defense attorney. (Tr. 306). Hippard testified that he examined the black knit material (GX 14) and found one Negroid limb hair and one Caucasian head hair on the outside. Hippard also examined the green knit cap (GX 15) and found two Negroid limb hairs. (Tr. 310). He found no Caucasian hairs on the hat. (Tr. 318). Hippard also testified that he had no idea who had handled the evidence before it arrived at his laboratory in Washington, D.C., and that the items had arrived in the blue suitcase, unwrapped and mixed with other evidence. None of the hairs found on the exhibits were suitable for comparison with known samples. (Tr. 310).

The defendant's case concluded with the offer into evidence of bank surveillance photographs which were an addition to those presented by the Government. (GX 1A-H; DX D-S; Tr. 322).

ARGUMENT

POINT I

The Trial Court Properly Denied the Defendant's Motion to Suppress Evidence Seized at the Time of His Arrest.

Lewis argues that Judge Metzner erred in denying the defense motion to suppress evidence seized from Lewis and the taxi in which he was riding at the time of his arrest.* He claims that he was illegally arrested and that the evidence seized incident to and searched as a result of

* The evidence includes the loaded pistol (GX 10), ammunition (GX 11-13), and black knit mask (GX 14) taken from Lewis' person and the suitcase containing the robbery proceeds (GX 2-7), which was found in the taxicab.

that arrest should have been suppressed. The record of the pretrial suppression hearing, however, demonstrated that Police Officer Cowles acted lawfully in stopping and searching Lewis based upon information received from Reinaldo Carnaval, a victim-eyewitness. Information gathered after the stop established more than sufficient probable cause to arrest Lewis for unlawful possession of a gun, and the search which followed was then incident to a lawful arrest. Accordingly, Judge Metzner correctly denied Lewis' motion to suppress.

A. The Suppression Hearing

In response to Lewis' motion, Judge Metzner held hearings on April 4 and April 14, 1977. At the hearing the testimony of Reinaldo Carnaval, the eyewitness who was threatened by Lewis, and Walter Cowles, the police officer who stopped Lewis, provided more than sufficient evidence to justify the limited initial stop of Lewis, and the ultimate arrest.

Reinaldo Carnaval testified that on the morning of January 27, 1977 his car was struck by the car from which he later saw Lewis exit with a suitcase at Central Park South between Seventh and Eighth Avenues. When Carnaval approached Lewis at that location, the defendant placed his hand in a pocket of his raincoat and threatened to kill Carnaval. (4/14/77 Tr. 5). Carnaval then followed Lewis on foot to Broadway, where Lewis entered a taxicab. Lewis left the cab when Carnaval told the driver that Lewis was a burglar and had left the scene of an accident. (4/14/77 Tr. 7). As the driver took out a stick to pursue Lewis, Carnaval said, "I think he had a gun." Carnaval did not see what happened when the driver got close to Lewis, but he did see the driver run away from Lewis and back to the cab (4/14/77 Tr. 20).

After the incident with the cab driver, Carnaval saw the defendant enter another cab at 61st Street and Central

Park West (4/14/77 Tr. 8). Carnaval hailed the first cab and they followed the taxi in which the defendant was riding. At 73rd Street and Amsterdam Avenue, Carnaval rolled down the window of the cab and yelled to a policeman in an unmarked car, Officer Walter Cowles, that there was a passenger in the cab in front of them who had a gun. (4/14/77 Tr. 10, 25).

Officer Cowles confirmed Carnaval's testimony. On the morning of January 27th, he was in an unmarked car slowly moving north on Amsterdam Avenue between 72nd and 73rd Streets. (4/4/77 Tr. 10). A police officer for sixteen years, Cowles was assigned with a civilian partner to help derelicts in that area as part of the Manhattan Bowery Project. He testified that at about 10:00 A.M. a taxi stopped next to his car and Reinaldo Carnaval, the passenger, leaned out and asked if Cowles was a police officer. When Cowles replied that he was, Carnaval said that there was a man with a gun in the rear seat of the cab in front of them. (4/4/77 Tr. 11). Cowles asked Carnaval to repeat himself, which he did, adding, "... he had just hit my car." (4/4/77 Tr. 12).

Cowles pursued the cab carrying a passenger who Cowles believed was carrying a gun. He gave his location to police headquarters by radio and said that he was in pursuit of a "yellow taxi with a passenger in the rear seat presumably armed with a gun." (4/4/77 Tr. 13). Officer Cowles heard the police dispatcher direct units to respond to his assistance, which resulted in a roadblock at 85th Street and Amsterdam Avenue.

When the cab carrying Lewis stopped in traffic at the roadblock, Officer Cowles approached with his gun drawn. He opened the rear door, identified himself as a police officer and pointed his gun at the defendant, Alfred Lewis, who was in the back seat. He told Lewis to get out of the taxi, but Lewis did not respond, remaining in the cab with

his hand in the right-hand pocket of his coat. Cowles repeated his directions, and Lewis slowly removed his hand from the pocket and got out of the taxi. (4/4/77 Tr. 14, 15). Cowles then instructed the defendant to place his hands on top of the cab, and asked if he had a gun. Lewis said nothing, but nodded affirmatively. (4/4/77 Tr. 16). Cowles then reached into Lewis' right-hand raincoat pocket and removed a loaded, cocked .45 caliber pistol, which had a round in the chamber. After Cowles gave Lewis a brief pat-down, other officers came to his assistance. At this point Officer Cowles saw another policeman remove a blue suitcase from the rear of the taxicab. The suitcase was later searched at the police station and its contents were inventoried as part of routine police procedure (4/4/77 Tr. 18, 19). Inside the suitcase Cowles saw two brown shopping bags containing money which he later learned was from the robbery at the Chemical Bank. (4/4/77 Tr. 18, 20).

Judge Metzner denied Lewis' suppression motion, finding that Officer Cowles had acted properly in stopping, arresting and searching the defendant. (4/14/77 Tr. 33-34).

B. The District Court's Ruling Was Correct

Lewis argues on appeal that Carnaval's statement to Officer Cowles did not justify the seizure of the gun and Lewis' arrest. This argument is without merit. Carnaval's report to Officer Cowles that Lewis was armed and had left the scene of an accident provided Cowles with was reasonable cause to stop and frisk Lewis for concealed weapons. Discovery of the pistol furnished probable cause to arrest, and the further search of Lewis and the suitcase were incident to the arrest.

Officer Cowles' "stop" and initial search of the defendant Alfred Lewis was reasonable under the "stop and frisk" rationale of *Terry v. Ohio*, 392 U.S. 1 (1968).

In *Terry* and its progeny, *Adams v. Williams*, 407 U.S. 143 (1972) and *United States v. Brigogni-Ponce*, 422 U.S. 873 (1975), the Court recognized that police officers are entitled to detain an individual briefly for "purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio*, *supra*, 393 U.S. at 22. Thus, this Court has sanctioned investigative stops similar to Officer Cowles' stop of Alfred Lewis based upon the officer's reasonable suspicion of criminal behavior. See *United States v. Magda*, 547 F.2d 756, 758 (2d Cir. 1976) and cases cited therein. In *Magda* this Court recognized that:

"... [A]n investigative stop will be found constitutionally permissible if 'the police officer [can] point to specific and articulate facts which taken together with rational inferences from these facts, reasonably warrant that intrusion.' [citing *Terry v. Ohio*, *supra*, and *United States v. Brignoni-Ponce*, *supra*]."

Lewis does not quarrel with the applicable standard, but claims that the stop and intrusion into his pocket were not reasonably warranted by the facts and inferences known to Officer Cowles. This argument is incorrect. Considered in the light most favorable to the Government, as they must be, *United States v. Oates*, 560 F.2d 45, 49 (2d Cir. 1977), the facts more than justify Officer Cowles' action.

Cowles first received information from Reinaldo Carnaval, the private citizen who hailed the police car. That report was that a man in the taxicab in front of them had a gun and had just struck Carnaval's car. Carnaval was not a paid informant, but rather a victim-eyewitness. Thus, Officer Cowles was entitled to accept Carnaval's information at face value, without the necessity for corroboration. *United States v. Jackson*, Dkt. No. 76-1564,

slip op. 4805, 4824 (2d Cir. July 19, 1977); *United States v. Rueda*, 549 F.2d 865, 869 (2d Cir. 1977); *United States v. Rodriguez*, 532 F.2d 834, 838 (2d Cir. 1976); *United States v. Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Miley*, 513 F.2d 1191, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975). Accordingly, Officer Cowles properly took up the chase without further inquiry. See *Adams v. Williams*, *supra*, 407 U.S. at 146-47. Compare, *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

The need for prompt action was further underscored by the exigencies of the situation: Cowles had been informed that Lewis was in a moving taxicab, had just left the scene of an accident and was armed. Officer Cowles could hardly have been expected in that event to "simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams*, *supra*, 407 U.S. at 145. Indeed once the police officer had been told by a conscientious citizen that another person was traveling around midtown Manhattan with a gun, the officer had a duty to stop the person with the gun and make the appropriate inquiry.*

Having stopped the taxicab at the police roadblock, Officer Cowles was also justified in removing Lewis from the taxicab and conducting a limited search for a gun. At the time he reached into Lewis' pocket, Officer Cowles had already seen Lewis hesitate in leaving the taxicab when ordered to do so, and—more importantly—hesitate in removing his hand from the raincoat pocket where the officer reasonably could believe Lewis had secreted the

* In fact Officer Cowles also had been informed by the eyewitness that Lewis had left the scene of an accident—a violation of New York law. Section 600, New York Vehicle and Traffic Law. (McKinney, 1970).

gun Carnaval had told him about. These actions by the defendant led to the reasonable conclusion that Lewis *was* armed, as Carnaval had stated and that the pistol was in his raincoat pocket. Once Lewis was outside the taxicab, Officer Cowles' suspicions were confirmed by Lewis' affirmative nod to Cowles' question about the gun.* Thus, the officer's limited intrusion into the defendant's pocket, in light of the exigencies of the situation, was entirely proper. *Terry v. Ohio, supra*; *United States v. Magda, supra*, 574 F.2d at 759. See *Commonwealth v. Mimms*, 46 U.S.L.W. 3369 (December 6, 1977).

The seizure of a concealed and loaded pistol on Lewis' person furnished Officer Cowles with probable cause to believe that Lewis had violated Sections 265.00, et seq., New York State Penal Law (McKinney, 1970), proscribing possession of weapons, the crime for which he was arrested.** (4/4/77 Tr. 20). Thereafter the search of Lewis' person and the taxicab in which he was arrested

* The Government did not elicit testimony concerning Lewis' affirmative nod during its case-in-chief. Although the nod occurred while Lewis was at gunpoint and before he was advised of his right to remain silent, *Miranda v. Arizona*, 384 U.S. 436 (1966), the nod does not affect the validity of Officer Cowles' seizure of the weapon. Because Officer Cowles was justified in frisking Lewis in any event, *Terry v. Ohio, supra*, he would have discovered the pistol even absent the nod. See *United States v. Galante*, 547 F.2d 733, 742 (2d Cir. 1976) (concurring opinion of Kaufman, C.J.); *United States v. Davis*, 265 F. Supp. 358, 362 (W.D. Pa. 1967).

** Officer Cowles was not required to determine whether Lewis had a permit for the gun before arresting him, as Lewis suggests (Br. 27-28). Compare *Adams v. Williams, supra*, 407 U.S. at 149-53 (dissenting opinion of Justices Douglas and Brennan).

was lawful. *Adams v. Williams, supra*, 407 U.S. at 149.*

POINT II

The District Court Properly Admitted Evidence Concerning The Description Of The Bank Robber.

Lewis claims that Judge Metzner erred in permitting Susan Brewer, Assistant Manager of the Chemical Bank, to testify to her recollection of the physical appearance and clothing of the bank robber. He claims on appeal, as his counsel had at trial, that Mrs. Brewer's testimony was tainted because she did not furnish a description to police officers until after she had viewed the defendant sitting alone in a cell at the 20th Precinct. Following a hearing out of the jury's presence Judge Metzner denied the motion to suppress, finding that Mrs. Brewer's description of the bank robber was based upon her independent observation in the bank and not her brief view of Lewis in the detention cell. This ruling was entirely correct and there was no error in allowing Mrs. Brewer to describe the physical appearance and the clothing worn by the bank robber.

* Lewis also challenges the opening of the suitcase at the police station as a warrantless search not incident to his arrest and therefore violative of the Fourth Amendment under *United States v. Chadwick*, 97 S.Ct. 2476 (June 21, 1977). His argument on this ground is to no avail because the facts of this case are not violative of *Chadwick*. Here the suitcase was opened during a routine police inventory procedure (4/4/77 Tr. 19). See *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976). In any event, this Court need not reach that issue because the search here occurred five months prior to the decision in *Chadwick*, which may not be applied retroactively. *United States v. Reda*, Dkt. No. 77-1062 (2d Cir. October 12, 1977) (On Rehearing). Thus, the search may be sustained as incident to Lewis' arrest under the law in this Circuit. *United States ex rel. Muhammed v. Mancusi*, 432 F.2d 1046 (2d Cir. 1970), cert. denied, 402 U.S. 911 (1971).

Susan Brewer was the Government's first witness. When the Assistant United States Attorney asked her to describe the bank robber, defense counsel objected on the ground the witness's viewing of the defendant at the station house shortly after the robbery had tainted her in-court description of the bank robber. (Tr. 26). Despite the fact that the Government had made it clear that it would not attempt to elicit an in-court identification of Lewis as the robber (Tr. 27), the District Judge still conducted a hearing outside the jury's presence on the circumstances surrounding Brewer's view of Lewis at the police station following the bank robbery, and her view of the bank robber during the robbery. (Tr. 29-39).

At that hearing, Mrs. Brewer testified that she had observed the robber in the bank for seven or eight minutes; at one point the robber was right at her side. (Tr. 30). When the police arrived at the bank Mrs. Brewer did not give a description of the robber, but was taken to the 20th Precinct where she was asked to look at the defendant, Alfred Lewis, who was alone in the detention cell. (Tr. 32-35). She described him as wearing "a dark iridescent-colored raincoat . . . , dark pants, looked like knit, almost black with a touch of white in them and black shoes with, I think, rubber soles." Lewis also had a leather-type hat with earmuffs. (Tr. 36). Several hours later a policeman and an FBI agent asked Mrs. Brewer to describe the bank robber. (Tr. 37). Included in the description was her recollection of the skin color of the robber. (Tr. 37).

Judge Metzner denied the defense motion to preclude Mrs. Brewer from describing the bank robber. The District Court ruled that Mrs. Brewer's testimony concerning the skin color and the clothing worn by the robber was not tainted by the procedure at the police station and that, in any event, her testimony was not being offered to describe the *defendant* in the bank but rather the bank

robber whose identity she did not know at the time.* (Tr. 39).

Lewis' claim that the station house snowup violated his Fifth and Sixth Amendment rights is misplaced. Because Mrs. Brewer was not asked to identify Lewis at trial, there was no evidence to be tainted by the purported violation of Lewis' rights. Consequently the cases cited by Lewis, such as *Stovall v. Denno*, 388 U.S. 293 (1967), *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967) and their progeny are not applicable to this case where the Government simply offered Mrs. Brewer's description of the robber in the bank, without reference to the defendant or to his presence at the police station. Thus, the events at the police station had no effect on the admissibility of Mrs. Brewer's direct testimony. Moreover, as the Supreme Court recently made clear in *Manson v. Brathwaite*, 45 U.S.L.W. 4681, 4685 (June 14, 1977), the primary fear addressed by the *Wade-Gilbert-Stovall* trilogy is that an eyewitness's recollection of a stranger viewed under emotional stress can be

* Following Judge Metzner's ruling Susan Brewer described the bank robber for the jury as a man of "medium height, five-foot 9 or 10, maybe 175 or 180." (Tr. 39). She described his clothing as follows:

"A knit stocking cap pulled over his head, down to the top of his eyeglasses and something pulled up to the end of his nose, a khaki jacket about hip-length, dark trousers, looked like they were knit, with a little white speck in them, black shoes with rubber soles; he had a gun in his hand, in his right hand, and a dark coat, and a work glove on that hand." (Tr. 40).

At one point, when the robber was standing at Mrs. Brewer's side, she observed yellowish-tinted skin and very short curly hair at the back of his head as he leaned over. (Tr. 42). Mrs. Brewer further identified bank surveillance photographs taken during the robbery (GX 1A-I; Tr. 43-4), but she was not asked to make an in-court identification of the defendant. No questions were asked during direct examination concerning Mrs. Brewer's viewing of Alfred Lewis at the 20th Precinct.

distorted by later police actions, and the subsequent in-court identification, which can be devastating evidence, will be tainted. Thus, the Court must insure that the in-court identification is reliable. *See also Neil v. Biggers*, 409 U.S. 188 (1972). The problems incident to an eyewitness's recollection of clothing worn by the perpetrator of a crime do not pose the same risks associated with an in-court identification of the defendant as the person the eyewitness saw commit the crime.*

Even if the Court were to conclude that the principles embodied in *Wade*, *Gilbert* and *Stovall* have some analogous applicability to the situation in this case, it is clear that Judge Metzner was correct in ruling that Mrs. Brewer's testimony concerning the robber's skin color and his clothing was not tainted by the procedure used in the police station.** Since Mrs. Brewer had the opportunity to observe the robber in the bank for a considerable period of time, and she was able to view the robber at close range for several minutes, an in-court identification would not have been tainted, but would have been based upon her independent recollection of what she had seen in the bank. *See Manson v. Brathwaite, supra*; *Neil v. Biggers*, 409 U.S. 188 (1972).

* Essentially Lewis' argument is that a witness should not be shown any physical evidence prior to testifying. Thus once a witness is shown a document or some clothing at the Assistant United States Attorney's office the witness would be precluded from describing or identifying the document or clothing in court. Such a result is certainly not the law, and we fail to see any reason for its justification.

** The use of a showup can be an appropriate investigative tool to determine if the police have captured the right person. *See Manson v. Brathwaite, supra*, 45 U.S.L.W. at 4683; *United States v. Tolliver*, Dkt. No. 77-1017, slip op. 863, 867 n. 2 (2d Cir. Jan. 3, 1978).

This case exhibits the proper use of the fact that the eyewitness prior to the trial had seen the clothing allegedly worn by the robber: to impeach that recollection, not to preclude the in-court testimony. In this case defense counsel was faced with the fact that Mrs. Brewer had not identified Lewis as the robber, and indeed had not testified at all about the defendant. Defense counsel thus had the option of cross-examining or not about the events at the police station. Because part of the defense in this case was that Lewis had been formed by the police, counsel properly attempted to show through cross-examination that Mrs. Brewer's identification of the robber's clothing was the product of her having seen Lewis at the police station. Indeed, defense counsel so argued in summation.* (Tr. 340-41).

Finally, any "taint" argument is undercut by Lewis' own appearance and testimony at trial. Corroborating Mrs. Brewer, he testified that at the time of his arrest he had worn black rubber-soled shoes and the same pants and raincoat which he wore on the witness stand. (Tr. 292-93). He also admitted that the hair on the back of his neck was short. (Tr. 297). Thus, by observing Lewis' appearance, and by viewing the surveillance photographs, the jury themselves were able to judge the accuracy of Mrs. Brewer's description. But there can be no error in

* Specifically, defense counsel pointed out on cross-examination that Mrs. Brewer had seen Lewis in the cell at the precinct. (Tr. 54). However, Mrs. Brewer testified that although she had given her description of the robber to the police only after seeing him at the police station, she had described him from what she remembered seeing in the bank. (Tr. 54). When asked what Lewis was wearing in the cell, Mrs. Brewer replied, "Shoes and trousers were the same; he had on a dark raincoat with sort of iridescent sheen to it and a hat, plastic, with like the furry lining and earmuffs." (Tr. 56). On redirect examination, Mrs. Brewer explained that the shoes and trousers which she had seen Mr. Lewis wearing in the cell were the same clothing she had seen worn by the robber in the bank. (Tr. 63).

permitting Mrs. Brewer's testimony here since it was the defense which injected the stationhouse identification into the trial on the cross-examination. She was fully entitled to testify to her recollection of the events in the bank, including her description of the robber, because she had a good opportunity to view the robber. Cross-examination about the source of her description properly went to the weight and not the admissibility of her testimony concerning the robber's description. See *United States ex rel. Stovall v. Denno*, 355 F.2d 731, 735-36 (2d Cir. 1966), *aff'd*, 388 U.S. 293 (1967).

POINT III

The Defendant Received a Fair Trial.

In several separate points, Lewis claims that he was denied a fair trial. None of his arguments have merit, either collectively or individually.

A. The Police Tapes

Lewis attempted to prove at trial through his incredible story that the bank had been robbed by "Max," a white man. Thus, as part of the defendant's case, he sought to offer into evidence tape-recorded police radio car messages which were made following the robbery. Some of the messages refer to the fugitive robber as a "male, white." Judge Metzner correctly sustained the Government's objection to the admission of the tapes which were hearsay in the extreme.

Contrary to Lewis' argument, the tapes were hearsay and were not admissible under any recognized exception to the hearsay rule. They were not "public records or reports" because "in criminal cases matters observed by police officers" are specifically excluded from that exception. Rule 803(8)(B), Fed. R. Evid. Nor were the

tapes business records as Lewis argues. While it was the regular course of business of the police to make and keep the tape recordings, they were not made "by or from information transmitted by, a person with knowledge." Rule 803(6) Fed. R. Evid. The Advisory Committee Note to that Rule makes clear why the tapes were properly rejected as evidence:

"If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not."

In short, because those who reported their impressions to the police officers were not acting in the course of *their* business the descriptions which were re-broadcast by the police are not admissible as business records. *United States v. Smith*, 521 F.2d 957, 964-65 (D.C. Cir. 1975); *Yates v. Blair Transport, Inc.*, 249 F. Supp. 681 (S.D. N.Y. 1965).

Lewis also claims that the tapes should have been admitted as part of the *res gestae* of the bank robbery. This argument likewise is without merit. Both the exceptions for "present sense impression" and "excited utterance" in Rules 803(1) and (2), respectively, require some proof of state of mind of the ultimate declarant, here the person who supplied the information to the police. There is no proof in this case of the identity of the declarant or that the person's statement was made while he "was perceiving the event or condition or immediately thereafter," (Rule 803(1)) or while "under the stress of excitement caused by the event or condition." (Rule 803(2)). There is no evidence here that the information was

conveyed to the police by someone with actual knowledge of the robber's race or even by someone who had obtained knowledge from such a person.* Compare, *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977). In the absence of any proof concerning either the identity of the declarant or the relation of the declarant to the events reported on the tapes, the hearsay report cannot be considered *res gestae* by any stretch of the imagination.

Lewis' final argument on this point is that the tapes were not offered for the truth of the matter asserted therein, but rather to impeach the police officers who testified against him. Although he made no offer of proof concerning the repetition of the erroneous "male, white" description on the tapes, Lewis claims that the tapes proved "that the things the law enforcement people denied were said or they heard were actually broadcast in such repetitious fashion as to shatter anyone's credibility who said he didn't hear them. . ." (Br. at 45). All of the police officers testified that they heard certain reports over the police radio to the effect that the bank had been robbed and that the police were pursuing a brown car, but none recalled having heard the description "white male, armed with an automatic." (Tr. 133, 150, 163, 177, 192). While the tapes may have established the existence of such a description over the police radio, however, there was nothing about the tapes to impeach the officers' credibility that they had not *heard* such a description. Thus, as Judge Metzner pointed out, the tapes were

* The declarant is not identified by evidence as James Rodriguez, as Lewis claims. Indeed, the tapes contain transmissions by many police officers repeating stories received from several unidentified individuals. Rodriguez was used as an example of a probable source by Government counsel in opposing the admissibility of the tapes; his name was furnished to defense counsel well in advance of trial and counsel had interviewed him. (Tr. 232).

not admissible solely to impeach the officers' credibility. Compare, *United States v. Smith*, *supra*.

Finally, Judge Metzner's rejection of the tapes was a proper exercise of his discretion to exclude matters which would have confused and misled the jury. Rule 403, Fed. R. Evid. It is axiomatic that the decision to admit or exclude evidence is committed to the discretion of the trial court, and that discretion will rarely be disturbed on appeal. See *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*); *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076, 1092 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Accordingly Judge Metzner was in the best position to balance the probative value of the evidence (which was at best minimal) against the possibility that it could mislead the jury.

B. The Ski Mask

Lewis claims that he was denied a fair trial due to a variance between a pretrial discovery letter sent by Government counsel and the proof at trial. This argument is meritless.

Prior to trial, the Government furnished defense counsel with a list of tangible items of evidence, pursuant to Rule 16, F. R. Crim. P. In that letter (Document No. 26 in Appellant's Supplemental Record on Appeal), the Government erroneously indicated that the black knit ski mask had been taken from the taxicab in which Lewis was riding when arrested. In fact, the testimony showed that it was removed from his neck. (Tr. 142). Judge Metzner correctly denied the defense objection to the testimony because Lewis showed no prejudice by the variance. (Tr. 145-46). Lewis did not seek to preclude the testimony, nor did he seek a continuance to meet this

testimony, his only remedy if he was truly surprised. *United States v. Andrews*, 381 F.2d 377, 378 (2d Cir. 1967), *cert. denied*, 390 U.S. 960 (1968). Moreover, Lewis' counsel had ample opportunity to cross-examine Officer Baumer on this point, and he did so. (Tr. 153). Lewis also sought to admit the discovery letter into evidence as an admission by the Government that the mask had been found in a location other than on his person. However, the letter had no relevance to the proof at trial, was hearsay, and was not admissible under any exception to the hearsay rule. Thus, Judge Metzner properly refused to admit it into evidence.

C. Flight

The defendant takes issue with the District Court's instruction concerning the effect of evidence of flight. Specifically, Lewis claims, as his counsel did at trial, that the court's charge was erroneous because it "did not make clear to the jurors that it was for them to decide whether it was the defendant who fled from the bank." (Br. 50). This claim is wrong. Judge Metzner correctly charged the jury on flight as follows:

"There has been evidence that the defendant was observed fleeing from the bank after the robbery was alleged to have occurred. The flight of a defendant immediately after it is discovered that a crime has been committed is a fact, if proved, which may tend to prove the consciousness of guilt on the part of the defendant. Such a fact may be considered by you with all the other evidence and the significance, if any, which you attach to it is a matter for your own determination. The flight of a defendant does not create a presumption of guilt, but it is merely a factor to be considered along with all the other evidence in determining the guilt or innocence of a defendant." (Tr. 376-77)

Contrary to Lewis' claim, Judge Metzner did not assume in his charge that Lewis was identified as the man who fled from the bank, but pointed out that flight by the defendant, *if proved*, might be considered by the jurors as evidence of consciousness of guilt. That instruction was entirely proper, and was clearly raised by the evidence in the case. See *United States v. Malizia*, 503 F.2d 578, 582-83 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975); *United States v. Accardi*, 342 F.2d 697, 700 (2d Cir. 1965).

D. Defense Counsel

Holding true to the maxim that "A convicted client is a dissatisfied client. . . .", *United States v. Garguilo*, 324 F.2d 795, 797 (2d Cir. 1969), Lewis argues that the representation by his court-appointed lawyer was ineffective. Judge Metzner properly rejected this meritless claim in ruling on Lewis' motion for a new trial (Document 23 of Appellant's Supplemental Record).

Lewis' defense counsel thoroughly cross-examined the Government's witnesses and argued his client's defense forcefully, in the face of overwhelming evidence of guilt and hampered by the obviously incredible story concocted by the defendant. Counsel's alleged failure to call witnesses to testify about a police officer carrying the green coat into the police station and to authenticate the computer printout relating to the police radio tapes were matters of trial strategy and defense counsel's decisions will not be second-guessed. See *United States v. Tolliver*, *supra*, slip op. at 876; *United States v. Daniels*, 558 F.2d 122, 126 (2d Cir. 1977); *LiPuma v. Commissioner, Department of Corrections*, 560 F.2d 84, 93 (2d Cir. 1977). Indeed, had counsel called those witnesses, as Judge Metzner found, it would not have appeared that the jacket was planted in the detention cell by the police, as Lewis himself claimed. The witnesses would not have helped the defendant at all. Likewise, trial counsel's

cross-examination of Susan Brewer was effective, because it created the impression that her identification of Lewis' clothing was tainted by the circumstances in which she viewed him at the police station. Moreover, since Lewis' own testimony corroborated hers, there could not possibly have been any prejudice here.

Lewis' claim that counsel's objections to the green jacket (EX 17) were inadequate is also frivolous. The objection which the trial court in its discretion denied was on the basis of relevance and lack of foundation. (Tr. 206-7). The objection was more than sufficient to preserve the issue for appeal, and the foundation for admissibility was more than adequate: from surveillance photos and testimony of bank witnesses it was clearly the robber's jacket, and FBI Agent Conway testified that when he removed Lewis from the detention cell the jacket was there. Nor did Lewis' testimony have any effect on the foundation for the jacket's admissibility.

Finally, there was no breach of the attorney-client privilege as Lewis claims. Defense counsel, in properly seeking pre-trial rulings, noted that his client had told him the entire story of the incident. (Tr. 2). No communication was divulged and it was obviously necessary to show Judge Metzner that Lewis agreed with what counsel sought. Yet counsel was not safe from his client's criticism even in that regard. In any event, there was no disclosure of the substance of any communication here, merely the fact that a communication had occurred. That fact is not privileged. *Colton v. United States*, 306 F.2d 633, 636-37 (2d Cir.), *cert. denied*, 371 U.S. 951 (1962).

Mr. Joy's representation of Lewis was effective and competent and was anything but the type of representation which would "shock the conscience of the Court and make the proceedings a farce and mockery of justice." *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert.*

denied, 338 U.S. 950 (1950). See also *United States v. Bubar*, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir. June 30, 1977). *United States v. Joyce*, 542 F.2d 158 (2d Cir. 1976); *United States v. Currier*, 405 F.2d 1039 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969).

E. Government Counsel

In his effort to find fault with all parties to the trial other than himself, Lewis argues that the prosecutor should have been disqualified because he allegedly used "surprise" testimony and signalled witnesses. There is no basis in fact for these arguments, as Judge Metzner properly found. (Tr. 167). Nor is it significant that the same prosecutor was involved in a prior trial in which Lewis was acquitted of bank robbery charges.* There simply is no evidence here of any misconduct on the part of the prosecutor, and consequently no ground for relief exists.

F. The District Court Judge

Lewis' wrath finally settles on Judge Metzner, whom the defendant accuses of acting to his prejudice by interrupting the cross-examination of a witness and by failing to conduct a hearing into Lewis' unfounded charge that the prosecutor was giving signals to Government witnesses. There is absolutely nothing in this record to suggest that

* Following that acquittal, Lewis sued the District Judge, the Assistant United States Attorney and various other officials for alleged violations of Lewis' civil rights by bringing him to trial. The suit, which sought millions of dollars in damages, was dismissed outright by Judge Frankel. *Lewis v. United States*, 76 Civ. 917 (S.D.N.Y. July 26, 1976). This fact was called to Judge Metzner's attention in connection with his consideration and ultimate denial of Lewis' groundless pretrial motion to disqualify the Assistant United States Attorney. (2/15/77 Tr. 9-12).

Judge Metzner acted in any way to Lewis' prejudice. Indeed, despite Lewis' own misconduct in making statements from counsel table in the presence of the jury (Tr. 166-67), the District Judge took pains to insure that no undue mention of that misconduct was made to the jury and thus *avoided* any possible prejudice to Lewis' case. (Tr. 168). Lewis' claim of error in this regard deserves no response, save to point out that even the trial judge has not escaped Lewis' predictably groundless claim that everyone at trial—witnesses, lawyers and judge—acted to his prejudice.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Delia A. Gildea, being duly sworn,
deposes and says that she is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 19th day of January, 1978,
she served 2 copies of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Alfred Lewis (#05241)

P.O. Box PMB

Atlanta, Georgia 30315

And deponent further says that she sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Delia A. Gildea

Sworn to before me this

19th day of January, 1978.

Mary C. Averb

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